

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL MUTHEE MUNYWE,

Plaintiff,

v.

SCOTT R. PETERS, *et al.*,

Defendants.

CASE NO. 3:21-cv-05431-BJR-JRC

ORDER FOR AMENDED
COMPLAINT

Plaintiff filed a complaint under 42 U.S.C. § 1983. Dkt. 7. As discussed below, because plaintiff's complaint is deficient in several respects, this Court orders him to file an amended complaint.

Plaintiff was convicted in state court based on allegations that he forced a minor to perform oral sex on him. Plaintiff's complaint contains two main allegations: (1) certain defendants conspired to falsify evidence and suppress exculpatory DNA evidence in violation of his constitutional rights; and (2) other defendants violated his constitutional rights when they

1 conducted a cross-gender search of plaintiff while he was nude. Plaintiff seeks declaratory relief,
2 injunctive relief, and damages.

3 Although certain defendants have filed motions to dismiss, because these motions do not
4 involve all defendants and all claims, this Court has determined that a more appropriate way to
5 address these issues is by screening the entire complaint pursuant to 28 U.S.C. § 1915A(a) and §
6 1915(e).

7 Pursuant to this screening, the Court concludes that because plaintiff's direct criminal
8 appeal is pending, this Court must abstain from deciding his requests for declaratory and
9 injunctive relief. Furthermore, plaintiff's allegation that certain defendants fabricated evidence
10 and suppressed exculpatory DNA evidence necessarily imply that his criminal conviction is
11 invalid. Therefore, because plaintiff has not shown that his criminal conviction has been called
12 into doubt, he cannot raise these allegations in this § 1983 proceeding.

13 By contrast, plaintiff's allegations plausibly suggest that the cross-gender team violated
14 his rights under the Fourth Amendment when it they collected evidence from him while he was
15 nude. Plaintiff's allegations also plausibly suggest that this team violated the privilege against
16 self-incrimination and substantive due process when they allegedly gratuitously questioned him
17 while he was nude. Therefore, these § 1983 claims are properly pled and may proceed forward
18 when plaintiff files his amended complaint. Plaintiff's remaining allegations lack any plausible
19 factual support and, hence, fail to suggest any constitutional violations.

20 **I. Background**

21 Following a jury trial, plaintiff was convicted of a felony and sentenced in Pierce County
22 based on allegations that he forced a minor to perform oral sex on him. *See* Dkt. 7 at 3, 13;
23 <https://dw.courts.wa.gov/?fa=home.casesearch&terms=accept&flashform=0&tab=sup> (searching
24

Superior Courts under Select Court Level, Search by case number under Select Search type, Pierce County Superior Court under Court Name, and 18-1-04633-7 under Case Number; clicking Available link in first result and Judgment Rec # 209019586 for Michael Muthee Munywe; considering Docket Dates February 6, 2020 and March 27, 2020); *see also U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244 (9th Cir. 1992) (federal courts “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” (collecting cases)). Plaintiff’s direct appeal of his conviction is pending. *See* <https://dw.courts.wa.gov/?fa=home.casesearch&terms=accept&flashform=0&tab=sup> (searching Appellate Courts under Select Court Level, Search by name under Select Search Type, Court of Appeals Division II under Court Name, 01/01/2020 under Year Filed In/After, Michael Munywe under First Name and Last Name; clicking link for Case No. 546817).

Plaintiff sues these defendants: (1) Scott R. Peters, a prosecutor; (2) Julie Dier, a detective; (3) Malerie Ramos, a crime scene technician; (4) William Muse, a detective; (5) the City of Tacoma; (6) Jennifer Hayden, a DNA analyst; and (7) Washington State Patrol Crime Laboratory (“WSPCL”). Dkt. 7 at 4–5. Peter J. Helmberger of the Pierce County Prosecuting Attorney’s Office represents defendant Peters. Jennifer J. Taylor of the Tacoma City Attorney’s Office represents defendants Dier, Ramos, Muse, and City of Tacoma (“Tacoma defendants”). William Chandra Schwarz represents defendants Hayden and WSPCL (“State defendants”).

The following allegations come from the complaint. This Court assumes their truth to screen the complaint.

In count I, plaintiff alleges that defendants Peters and Hayden violated due process and equal protection by conspiring to suppress “clearly exculpatory DNA evidence” that included

1 “spit cup contents and its two DNA samples, fingernails and fingers DNA evidence[,] and
2 alleged scene evidence that was sidewalk DNA swabs.” *Id.* at 7–8.

3 In count II, plaintiff alleges that defendant Peters violated due process and equal
4 protection by forging, fabricating, and falsely creating “documents [defendant Peters] purported
5 to be phone contacts exchanges [sic] between a complainant and plaintiff.” *Id.* at 9.

6 In count III, plaintiff alleges that defendant Peters violated his rights to a speedy trial, due
7 process, and equal protection. *Id.* at 10. In support, he alleges that defendant Peters
8 “continuously” told the trial court that he was awaiting “delivery of DNA results” from WSPCL
9 even though “he already had possession of the results and knew very well that he was giving
10 false information.” *Id.* at 11. As a result, plaintiff alleges that the trial court granted “over twenty
11 . . . continuances over a period of 16 months.” *Id.* Plaintiff adds that defendants Peters and
12 Hayden conspired to “not bother doing serology testing on any evidence submitted for testing.”
13 *Id.*

14 In count IV, plaintiff alleges that defendant Hayden violated due process and equal
15 protection. *Id.* at 13. In support, he alleges that defendant Hayden “knew very well that she was
16 working on crucial evidence for oral sex allegations” but “did an incomplete job” by not testing
17 the “presence of body fluids like saliva and seminal fluids.” *Id.* Further, plaintiff alleges that
18 defendant Hayden withheld and suppressed “exculpatory evidence” that “included samples of
19 fingernails’ swabs and other DNA swabs of all ten fingers.” *Id.* at 14. Additionally, plaintiff
20 alleges that defendant Hayden decided not to test and “discarded” “spit cup contents” and/or
21 “two sets of evidence from the complainant and at the alleged scene of [the] crime” because she
22 suspected that this evidence was favorable to plaintiff. *Id.* at 14–15.

1 In count V, plaintiff alleges that, on November 22, 2018, defendants Dier, Ramos, and
2 Muse violated the First Amendment and equal protection and used excessive force on him. *Id.* at
3 16–17. In support, plaintiff alleges that they disrespectfully exposed his “nudity,” “especially his
4 genitals,” while taking photographs of him and collecting evidence from him following his
5 arrest. *See id.* Specifically, plaintiff alleges that these defendants “commanded” him to “stand by
6 the wall,” “remove that jacket,” “lift up [his] shirt,” “remove those pants,” “remove [his]
7 underwear,” “drop it down,” “split those legs apart,” and “lift [his] testicles.” *Id.* at 17. Further,
8 plaintiff alleges that defendant Ramos “took a series of unnecessary photographs” because “there
9 was another video camera that was recording the whole episode.” *Id.* Additionally, plaintiff
10 alleges that these defendants so acted “for their personal enjoyment and fun.” *Id.* Plaintiff admits
11 that defendant Ramos “had a lawful task in evidence collection.” *Id.* However, he alleges that
12 “other male technicians . . . [could] have performed the task.” *Id.* Plaintiff adds that being
13 interrogated while nude and embarrassed “compel[led] him to a confession.” *See id.*

14 Plaintiff also alleges that he is of “East African Bantu tradition” and that defendants
15 “should have known that people of different origins, traditions[,] and religions may observe
16 religiously-based nudity taboos.” *Id.* at 18. Moreover, plaintiff alleges that the area where these
17 defendants conducted the search was contaminated. *Id.* at 17.

18 In count VI, plaintiff alleges that defendant WSPCL’s “policies, customs, and norms”
19 caused defendant Hayden to improperly test and analyze DNA evidence in his case. *See id.* at 19.

20 In count VII, plaintiff contends that defendant City of Tacoma’s “policies, customs[,] and
21 norms” caused defendants Dier, Ramos, and Muse to violate plaintiff’s constitutional rights
22 during their search alleged in count V. *See id.* at 21.

1 Plaintiff seeks damages, injunctive, and declaratory relief. *See id.* at 22–24. Regarding
2 defendant Peters, plaintiff seeks: (1) suspension of his law license; (2) an investigation; and (3)
3 an order enjoining Peters from involvement in his postconviction cases or any future cases
4 involving plaintiff. *Id.* at 22–23. Regarding defendant Hayden, plaintiff seeks: (1) an order
5 requiring the “destruction and nullification” of her “DNA work product” and precluding the use
6 of her “DNA results” in plaintiff’s future postconviction litigation; and (2) an order prohibiting
7 Hayden from doing “future DNA testings” in any case involving plaintiff. *Id.* at 23. Likewise,
8 regarding defendant WSPCL, plaintiff seeks an order prohibiting it from doing “future DNA
9 testings” in any case involving plaintiff. *Id.* at 24. Furthermore, plaintiff seeks: (1) nominal
10 damages from all defendants; and (2) punitive damages from defendants Hayden, Muse, Dier,
11 City of Tacoma, and WSPCL. *Id.* at 22–24.

12 On June 23, 2021, this Court ordered service of the same. *See* Dkt. 9 at 1. On August 6,
13 2021, the State defendants answered. Dkt. 26. On August 13, 2021, before the remaining
14 defendants answered or otherwise responded, this Court entered a scheduling order that set a
15 disposition motions deadline of February 10, 2022. Dkt. 28. On August 23, 2021, the Tacoma
16 defendants and defendant Peters filed motions to dismiss. Dkts. 29, 31. Plaintiff filed lengthy
17 responses to the motions to dismiss. Dkts. 40–41. Defendants filed replies. Dkts. 45–46.

18 Under the Prison Litigation Reform Act (“PLRA”), this Court is required to screen
19 complaints brought by prisoners seeking relief against a governmental entity or officer or
20 employee of a governmental entity. 28 U.S.C. § 1915A(a); *O’Neal v. Price*, 531 F.3d 1146, 1152
21 (9th Cir. 2008). This Court must “dismiss the complaint, or any portion of the complaint, if the
22 complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted;
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1 or (2) seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. §
2 1915A(b).

3 Likewise, because plaintiff is proceeding *in forma pauperis* (“IFP”), Dkt. 6, this Court
4 must screen his amended complaint under § 1915(e). *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th
5 Cir. 2000) (en banc). Under § 1915(e)(2)(B), a district court must dismiss a prisoner’s IFP case
6 at any time if it determines that the case is (i) frivolous or malicious; (ii) fails to state a claim on
7 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune
8 from such relief. *O’Neal*, 531 F.3d at 1153 (citation and internal quotation marks omitted).

9 Section 1915A and § 1915(e) both allow district courts to screen a complaint at any time
10 during a case. *See* 28 U.S.C. § 1915A (“The court shall review . . . *as soon as practicable after*
11 *docketing*[] a complaint” (emphasis added)); 28 U.S.C. § 1915(e)(2) (“[T]he court shall
12 dismiss the case at any time”). The district court may screen a complaint under these
13 provisions even if it has entered a scheduling order, *Blackwell v. Pizzola*, No. CIV S-09-0535,
14 2010 WL 4705183, at *5 (E.D. Cal. Nov. 12, 2010) (citing *Byrd v. Maricopa Cty. Sheriff’s*
15 *Dep’t*, 565 F.3d 1205, 1212 (9th Cir. 2009)), or if a defendant has filed a motion to dismiss,
16 *Lopez*, 203 F.3d at 1126 n.6, or moved for summary judgment, *Byrd*, 565 F.3d at 1212, *judgment*
17 *vacated on other grounds*, 629 F.3d 1135 (9th Cir. 2011).

18 Here, screening the complaint promotes clarity and judicial economy. Therefore, even
19 though defendant Peters and the Tacoma defendants have moved to dismiss certain claims, this
20 Court concludes that screening the entire complaint at this stage is a more appropriate way to
21 address these issues.

22 The standard for determining whether a plaintiff has failed to state a claim under §
23 1915A(b)(1) and § 1915(e)(2)(B)(ii) is the same as Federal Rule of Civil Procedure 12(b)(6)’s
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1 standard for failure to state a claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012);
 2 *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). So, under § 1915A(b)(1) and §
 3 1915(e)(2)(B)(ii), the court may dismiss a complaint that fails “to state a claim to relief that is
 4 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial
 5 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
 6 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.
 7 662, 678 (2009).

8 “In determining whether a complaint states a claim, all allegations of material fact are
 9 taken as true and construed in the light most favorable to the plaintiff.” *Barnett v. Centoni*, 31
 10 F.3d 813, 816 (9th Cir. 1994) (per curiam) (citation omitted). “Dismissal is proper only if it is
 11 clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him
 12 to relief.” *Watison*, 668 F.3d at 1112 (citation omitted). There is “an obligation where the
 13 petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to
 14 afford the petitioner the benefit of any doubt.” *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 642
 15 (9th Cir. 2018) (per curiam) (citation omitted). However, while the court can liberally construe a
 16 plaintiff’s complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena v.*
 17 *Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (per curiam) (citation omitted).

18 II. Discussion

19 A. Younger

20 In *Younger*, “the Supreme Court held that a federal court may not interfere with a pending
 21 state criminal prosecution absent extraordinary circumstances.” *Logan v. U.S. Bank Nat’l Ass’n*,
 22 722 F.3d 1163, 1167 (9th Cir. 2013). “Specifically, *Younger* abstention is appropriate when: (1)
 23 there is an ongoing state judicial proceeding; (2) the proceeding implicates important state
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1 interests; (3) there is an adequate opportunity in the state proceedings to raise constitutional
 2 challenges; and (4) the requested relief seeks to enjoin or has the practical effect of enjoining the
 3 ongoing state judicial proceeding.” *Arevalo v. Hennessy*, 882 F.3d 763, 765 (9th Cir. 2018)
 4 (alterations adopted) (citation and internal quotation marks omitted). “*Younger* principles [also]
 5 apply to actions . . . for . . . declaratory relief.” *Gilbertson v. Albright*, 381 F.3d 965, 968 (9th Cir.
 6 2004) (en banc).

7 “However, even if *Younger* abstention is appropriate, federal courts do not invoke it if there
 8 is a showing of bad faith, harassment, or some other extraordinary circumstance that would make
 9 abstention inappropriate.” *Arevalo*, 882 F.3d at 765–66 (citation and internal quotation marks
 10 omitted). “In the *Younger* abstention context, bad faith generally means that a prosecution has been
 11 brought without a reasonable expectation of obtaining a valid conviction.” *Baffert v. California*
 12 *Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003) (citation and internal quotation marks
 13 omitted). Bad faith may also mean that “the state tribunal is incompetent by reason of bias,” though
 14 “one who alleges bias must overcome a presumption of honesty and integrity in those serving as
 15 adjudicators.” *Hirsh v. Justs. of Supreme Ct. of State of Cal.*, 67 F.3d 708, 713 (9th Cir. 1995) (per
 16 curiam) (citation and internal quotation marks omitted). These exceptions are “narrow.” *Huffman*
 17 *v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). “[A] plaintiff who seeks to head off *Younger* abstention
 18 bears the burden of establishing that one of the exceptions applies.” *Diamond “D” Const. Corp. v.*
 19 *McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (citation omitted).

20 “For *Younger* purposes, the State’s trial-and-appeals process is treated as a unitary system.”
 21 *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369 (1989). Courts
 22 may *sua sponte* consider the propriety of a *Younger* abstention. *San Remo Hotel v. City & Cty. of*
 23 *San Francisco*, 145 F.3d 1095, 1103 (9th Cir. 1998); see *Younger*, 401 U.S. at 40–41.

1 Here, based primarily on the allegation that defendants Peters and Hayden conspired to
2 fabricate evidence and suppress exculpatory DNA evidence, plaintiff seeks unspecified declaratory
3 and sweeping injunctive relief. *See* Dkt. 7 at 22–24. This injunctive relief includes: (1) an
4 investigation of defendant Peters and suspension of his law license; and (2) an order requiring the
5 “destruction and nullification” of defendant Hayden’s “DNA work product” and precluding her
6 “DNA results” from use in plaintiff’s future postconviction litigation. *See id.*

7 *Younger* applies to these claims for declaratory and injunctive relief. Plaintiff’s direct
8 criminal appeal is pending and those proceedings implicate important state interests. *See Kelly v.*
9 *Robinson*, 479 U.S. 36, 49 (1986) (citation omitted). Plaintiff can raise his constitutional claims on
10 direct appeal or in a postconviction motion. *See, e.g., Bean v. Matteucci*, 986 F.3d 1128, 1134 (9th
11 Cir. 2021) (“[T]he speedy trial defense primarily protects the integrity of the trial itself and, like
12 most trial rights, can be vindicated through reversal of the improperly-obtained conviction.”
13 (citation and internal quotation marks omitted)); *In re Stenson*, 174 Wash. 2d 474, 476–77 (2012)
14 (deciding claim under *Brady v. Maryland*, 373 U.S. 83 (1963) raised in a personal restraint
15 petition). Furthermore, the broad injunctive relief plaintiff seeks would have the practical effect of
16 enjoining his direct criminal appeal. As noted, plaintiff alleges that defendants Peters and Hayden
17 conspired to fabricate evidence and suppress exculpatory DNA evidence. Based on their alleged §
18 1983 violations, plaintiff seeks an investigation of defendant Peters and suspension of his law
19 license, as well as “destruction and nullification” of defendant Hayden’s “DNA work product.”
20 Granting such relief would cast such doubt on the validity of plaintiff’s conviction as to effectively
21 enjoin his prosecution.

22 Plaintiff concedes that defendant Ramos “had a lawful task in evidence collection” based
23 on the allegations of forced oral sex. *See* Dkt. 7 at 13, 17. Furthermore, judicial records show that
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1 a jury convicted plaintiff after a jury trial. Plaintiff's conclusory allegations that defendants were
2 biased against him because of his ethnicity and nationality cannot overcome the presumption of
3 regularity that attaches to his conviction. *See Hirsh*, 67 F.3d at 713. Therefore, plaintiff's
4 allegations do not plausibly suggest that his prosecution was brought in bad faith.

5 In sum, *Younger* requires this Court to abstain from deciding many of the claims for relief
6 at issue.

7 B. Heck

8 In addition, many of the claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).
9 "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, . . . , a
10 § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,
11 expunged by executive order, declared invalid by a state tribunal authorized to make such
12 determination, or called into question by a federal court's issuance of a writ of habeas corpus."
13 *Id.* at 477, 486–87. Furthermore, "a state prisoner's § 1983 action is barred (absent prior
14 invalidation)—no matter the relief sought (damages or *equitable relief*), no matter the target of
15 the prisoner's suit . . . if success in that action would necessarily demonstrate the invalidity of
16 confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (first emphasis
17 added).

18 Here, *Heck* bars the allegations in counts I, II, III, IV, and VI, the claims plaintiff bases
19 on them, and his related requests for relief. Again, the complaint's primary allegation is that
20 defendants Peters and Hayden conspired to fabricate evidence and suppress exculpatory DNA
21 evidence. Establishing these allegations would necessarily invalidate plaintiff's conviction. *See*,
22 *e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 536 (2011) ("[A] *Brady* claim, when successful
23 postconviction, necessarily yields evidence undermining a conviction[.]"); *Heck*, 512 U.S. at
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479, 486–87 (enunciating *Heck* rule where the plaintiff alleged that defendants had “knowingly destroyed evidence which was exculpatory in nature and could have proved petitioner’s innocence . . . and caused an illegal and unlawful voice identification procedure to be used at [the plaintiff’s] trial” (internal quotation marks omitted)); *Alwan v. Dembe*, 603 F. App’x 68, 69 (3d Cir. 2015) (per curiam) (plaintiff’s “claims—that he was maliciously prosecuted, falsely convicted on fabricated evidence, denied a fair and speedy trial, and denied access to exculpatory material—are barred by [*Heck*]” (citation omitted)); *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006) (*Heck* barred claims of “[w]rongful arrest, malicious prosecution, and a conspiracy among Los Angeles officials to bring false charges”); *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) (per curiam) (*Heck* bars “damages claims [that] rest on the contention that the defendants unconstitutionally conspired to convict [the plaintiff] of crimes he did not commit”).

In sum, *Heck* bars the allegations in counts I, II, III, IV, and VI and the related claims and requests for relief.

C. Defendant WSPLC

Defendant WSPLC “is an agency of the state of Washington and is therefore not a ‘person’ susceptible to suit under § 1983.” *Hanson v. Washington State Patrol*, No. 13-CV-0166-TOR, 2013 WL 4518594, at *2 (E.D. Wash. Aug. 26, 2013) (citation omitted). Thus, defendant WSPLC is an improper defendant.

Plaintiff seeks nominal and punitive damages from defendant WSPLC. Dkt. 7 at 22, 24. “States, state agencies, and state officers sued in their official capacities are absolutely immune from damage actions in federal court pursuant to the Eleventh Amendment, unless the state consents to suit.” *Lojas v. Washington*, No. CV-07-0140-JLQ, 2008 WL 1837337, at *7 (E.D. Wash. Apr. 22, 2008). And the state of Washington has not waived this “immunity in the federal

1 courts.” *Hanson*, 2013 WL 4518594, at *2 (citations omitted). So, whether against defendant
 2 WSPLC or the state of Washington, the Eleventh Amendment would bar plaintiff’s damages
 3 claims.

4 D. Equal Protection

5 “The Equal Protection Clause of the Fourteenth Amendment commands that no State
 6 shall deny to any person within its jurisdiction the equal protection of the laws, which is
 7 essentially a direction that all persons similarly situated should be treated alike.” *City of*
 8 *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation and internal quotation
 9 marks omitted). “To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection
 10 Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an
 11 intent or purpose to discriminate against the plaintiff based upon membership in a protected
 12 class.” *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (citation omitted).

13 Furthermore, “[w]here . . . state action does not implicate a fundamental right or a suspect
 14 classification, the plaintiff can establish a ‘class of one’ equal protection claim by demonstrating
 15 that it ‘has been intentionally treated differently from others similarly situated and that there is
 16 no rational basis for the difference in treatment.’” *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d
 17 936, 944 (9th Cir. 2004) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

18 Here, plaintiff alleges that defendants were biased against him and discriminated against
 19 him based on his race and national origin. *See, e.g.*, Dkt. 7 at 11, 14, 18. However, plaintiff
 20 alleges no facts suggesting that defendants engaged in the conduct at issue based on his race or
 21 national origin. Furthermore, plaintiff has not alleged that defendants intentionally treated him
 22 differently from similarly situated individuals and that there was no rational basis for the
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1 different treatment. In short, because plaintiff's allegations of bias and discrimination are
 2 conclusory, he has failed to state a facially plausible equal protection claim against defendants.

3 E. First Amendment

4 Plaintiff alleges that defendants Dier, Ramos, and Muse violated the First Amendment.
 5 *Id.* at 16. In support, he alleges that he is of "East African Bantu tradition" and that defendants
 6 "should have known that people of different origins, traditions[,] and religions may observe
 7 religiously-based nudity taboos." *Id.* at 18. The alleged religiously based nudity taboo appears to
 8 be that plaintiff cannot be nude in front of women. *See id.* at 16–18. Therefore, plaintiff
 9 concludes that these defendants violated his freedom to exercise his religion by collecting
 10 evidence from him and photographing him while he was nude. *See id.* Plaintiff's allegations
 11 compel the conclusion that he seeks damages based on this alleged First Amendment violation.
 12 *See* Dkt. 7 at 18, 22–24.

13 Here, this Court has not found any cases holding that a one-time, nude, cross-gender
 14 search pursuant to a "lawful task in evidence collection, Dkt. 7 at 17, but that the suspect's
 15 religion forbids, violates the First Amendment. Indeed, the Ninth Circuit has indicated that the
 16 Fourth Amendment or Eighth Amendment, depending on the plaintiff's custodial status, is the
 17 proper vehicle for such a claim. *See Jordan v. Gardner*, 986 F.2d 1521, 1524 n.3 (9th Cir. 1993)
 18 (en banc). So plaintiff has not adequately alleged that this conduct implicates the First
 19 Amendment. This Court could liberally construe plaintiff's First Amendment damages claim as a
 20 claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42
 21 U.S.C. §§ 2000cc *et seq.* However, plaintiff's construed RLUIPA is not viable. *See Jones v.*
 22 *Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015) ("RLUIPA does not authorize suits for damages
 23 against state officials in their individual capacities" (citation omitted)).
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1 In summary, plaintiff has not properly alleged a First Amendment claim, and the
2 complaint cannot be amended to cure these problems.

3 F. Fourth Amendment

4 “[C]ross-gender strip searches in the absence of an emergency violate [a pretrial
5 detainee’s] right under the Fourth Amendment to be free from unreasonable searches.” *See Byrd*
6 *v. Maricopa Cty. Sheriff’s Dep’t*, 629 F.3d 1135, 1137–38, 1146 (9th Cir. 2011) (en banc).

7 Here, plaintiff has adequately alleged that defendants Dier, Ramos, and Muse violated the
8 Fourth Amendment when they searched him. Plaintiff alleges that defendant Muse directed
9 defendant Ramos (a female) to take pictures of him and collect evidence from him while he was
10 nude and while defendant Dier (a female) watched. *See* Dkt. 7 at 16–17. Furthermore, plaintiff
11 alleges that these defendants forced him to assume several compromising positions “for their
12 personal enjoyment and fun.” *Id.* at 17. Additionally, plaintiff alleges that male officials were
13 available to conduct the search. *See id.* at 16–17. Plaintiff’s allegations plausibly suggest that
14 there was no emergency need for defendant Ramos to conduct the search or for defendant Dier to
15 observe it. And, at this stage, the record is not sufficiently developed to determine whether *Heck*
16 would apply to this claim. *See Heck*, 512 U.S. at 487 n.7. Therefore, based on the allegations in
17 count V, plaintiff has stated a facially plausible individual-capacity Fourth Amendment damages
18 claim against defendants Dier, Ramos, and Muse.

19 G. Compelled Confession

20 Plaintiff alleges that the above search “compel[led] him to a confession.” *See* Dkt. 7 at
21 17.

22 “No person . . . shall be compelled in any criminal case to be a witness against himself . .
23 . .” U.S. Const. amend. V. “[T]he Fifth Amendment provides a right against compelled self-
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1 incrimination, but that right only applies when a compelled statement is used against a defendant
 2 in a criminal case.” *Chavez v. Robinson*, 12 F.4th 978, 989 (9th Cir. 2021) (citation and internal
 3 quotation marks omitted). So only after a compelled incriminating statement is used in a criminal
 4 proceeding has an accused suffered the requisite constitutional injury for purposes of a § 1983
 5 action.” *Id.* (alteration adopted) (citation and internal quotation marks omitted). In addition to at
 6 trial, a “coerced statement has been ‘used’ in a criminal case when it has been relied upon to file
 7 formal charges against the declarant, to determine judicially that the prosecution may proceed,
 8 and to determine pretrial custody status.” *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir.
 9 2009).

10 Here, plaintiff has adequately alleged that defendants Dier, Ramos, and Muse violated his
 11 Fifth Amendment rights. Plaintiff alleges that, while gratuitously subjecting him to a
 12 compromising search, they “compel[led] him into a confession.” *See* Dkt. 7 at 17.

13 “A person subjected to coercive interrogation techniques can bring a substantive due
 14 process claim under the Fourteenth Amendment.” *Tobias v. Arteaga*, 996 F.3d 571, 584 (9th Cir.
 15 2021) (citations omitted). “The substantive due process standard requires showing that an officer
 16 engaged in an abuse of power that shocks the conscience and violates the decencies of civilized
 17 conduct.” *Id.* (alteration adopted) (citation and internal quotation marks omitted). “The Supreme
 18 Court has described police torture or other abuse as the type of claim cognizable under the
 19 Fourteenth Amendment.” *Id.* (citation omitted). “However, police conduct need not include
 20 physical violence to violate substantive due process.” *Id.* (citation and internal quotation marks
 21 omitted). “[P]sychological coercion [may be] sufficient to state a [‘shocks the conscience’]
 22 claim under the Fourteenth Amendment.” *See Stoot*, 582 F.3d at 929 (citation omitted).

1 Here, plaintiff has adequately alleged that the alleged interrogation methods of
2 defendants Dier, Ramos, and Muse violated substantive due process. Again, plaintiff alleges that,
3 while they gratuitously subjected him to a compromising search, they compelled him to confess.

4 This Court recognizes that *Heck* and/or *Younger* may potentially bar plaintiff from
5 alleging that defendants violated the privilege against self-incrimination and substantive due
6 process. *See, e.g., See Gilbertson*, 381 F.3d at 968 (holding that *Younger* may apply to damages
7 actions). . However, while *Heck* could potentially apply to this claim, the limited record before
8 this Court does not permit it to make such a determination at this time.

9 H. Excessive Force

10 Plaintiff alleges that defendants Dier, Ramos, and Muse used excessive force on him
11 during the search at issue. Dkt. 7 at 18. From the complaint, it is unclear whether plaintiff was an
12 arrestee or a pretrial detainee at that time. His precise custodial status is immaterial here because,
13 in either case, this Court must consider whether these defendants acted in an objectively
14 reasonable manner in using force on plaintiff.

15 “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in
16 the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed
17 under the Fourth Amendment and its ‘reasonableness’ standard[.]” *Graham v. Connor*, 490 U.S.
18 386, 395 (1989). Whether an officer’s use of force is “reasonable” “requires careful attention to
19 the facts and circumstances of each particular case, including the severity of the crime at issue,
20 whether the suspect poses an immediate threat to the safety of the officers or others, and whether
21 he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396 (citation omitted).

22 Similarly, “courts must use an objective standard” when determining whether the
23 defendant has used excessive force on a pretrial detainee in violation of the Fourteenth
24

1 Amendment’s Due Process Clause. *See Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015).

2 As in the Fourth Amendment context, “objective reasonableness turns on the ‘facts and
3 circumstances of each particular case.’” *Id.* at 397 (quoting *Graham*, 490 U.S. at 396).

4 Here, plaintiff has failed to allege facts to meet this minimum standard. Instead, plaintiff
5 broadly alleges, without describing any facts that would support such a claim, that defendants
6 Dier, Ramos, and Muse used excessive force on him during the search. Whether under the Fourth
7 Amendment or Due Process Clause, this conclusory allegation is insufficient to allow a claim to
8 go forward as drafted.

9 I. Contamination

10 Plaintiff alleges, without any factual support, that defendants Dier, Ramos, and Muse
11 conducted their search in a contaminated room. Dkt. 7. at 17. This conclusory allegation fails to
12 state a facially plausible § 1983 claim. Also, to the extent plaintiff alleges that the prosecution’s
13 DNA evidence was contaminated, it would call into question the validity of his conviction.
14 Therefore, *Heck* bars this allegation as explained above. *See supra* Part II(B). Therefore, plaintiff
15 should not include this claim in his amended complaint, as there is no basis upon which an
16 amended complaint could overcome these problems.

17 J. Count VII

18 In count VII, plaintiff alleges that the “policies, customs[,] and norms” of defendant City
19 of Tacoma caused the alleged constitutional violations of defendants Dier, Ramos, and Muse.
20 *See* Dkt. 7 at 21.

21 “To prevail on a claim against a municipal entity for a constitutional violation, a plaintiff
22 must show that an official’s action that caused the plaintiff’s injury was pursuant to [an] official
23 municipal policy [or custom] of some nature.” *Kirkpatrick v. Cty. of Washoe*, 843 F.3d 784, 793
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(9th Cir. 2016) (en banc) (citation and internal quotation marks omitted). “Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

Here, plaintiff has adequately alleged that these defendants violated the Fourth, Fifth, and Fourteenth Amendments during their cross-gender search. However, plaintiff has not adequately alleged that defendant City of Tacoma had a municipal policy or custom that caused this alleged constitutional violation. Rather, plaintiff simply alleges, without any factual support, that these defendants so acted pursuant to defendant City of Tacoma’s “policies, customs[,] and norms.” Dkt. 7 at 21. Such conclusory allegations fail to state a facially plausible § 1983 claim. If such a policy exists, and plaintiff was able to sufficiently allege facts to support such a cause of action, then plaintiff should identify this policy and allege sufficient facts to support this claim.

III. Conclusion

Accordingly, this Court **ORDERS** as follows:

1. On or before **December 27, 2021**, plaintiff must file an amended complaint that cures, if possible, the deficiencies identified in this order.
2. The amended complaint must be filed on this District’s § 1983 form, legibly written or retyped in its entirety, and filled out completely. Furthermore, the amended complaint must contain case number 3:21-cv-05431-BJR-JRC. If plaintiff requires additional space to allege his claims, he may submit no more than **five (5)** continuation sheets. Any continuation sheet, whether handwritten or typewritten, must comply with this District’s Local Rules governing form of filings, including rules governing text size, margin size, and line spacing. *See* Local Rule 10(d)–(e).

1 3. The amended complaint will act as a complete substitute for the complaint; this
2 Court will address only the claims alleged in it. This Court recognizes that plaintiff has
3 sufficiently pleaded violations of the Fourth, Fifth, and Fourteenth Amendments, as discussed
4 above. *Supra* Parts III(F)–(G). However, because the amended complaint will act as a complete
5 substitute for the complaint, **plaintiff must replead these claims and the facts supporting**
6 **them in the amended complaint. If he does not, this Court will not permit him to proceed**
7 **on these claims.** Likewise, plaintiff must plead any other claims he wishes to assert and the facts
8 supporting them in the amended complaint.

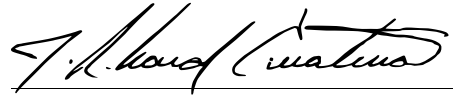
9 4. The amended complaint must not incorporate by reference any part of the
10 complaint. Likewise, the amended complaint must not incorporate arguments or text from any
11 other documents, including any exhibits. However, Plaintiff may, if he wishes, submit any
12 exhibit necessary to support the amended complaint's allegations.

13 5. Plaintiff must not unjustifiably expand the scope of the case by alleging new
14 unrelated claims or parties in the amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th
15 Cir. 2007).

16 6. If Plaintiff fails to timely file an amended complaint, or if he otherwise fails to
17 comply with this order, **this Court will dismiss this case or impose any appropriate sanction**

18 The Clerk is directed to **SEND** Plaintiff the appropriate forms for filing a § 1983 action
19 and a copy of this order. The motions to dismiss of the Tacoma defendants (Dkt. 29) and
20 defendant Peters (Dkt. 31) are **DENIED AS MOOT**.

1 Dated this 24th day of November, 2021.

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4 J. Richard Creatura
5 Chief United States Magistrate Judge
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